

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

JOHN E. WINFIELD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 4:03CV192-DJS
	)	CAPITAL HABEAS
DON ROPER,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

On July 16, 1998, a jury in the Circuit Court of St. Louis County found petitioner John Winfield guilty of two counts of first-degree murder, two counts of first-degree assault, and four counts of armed criminal action. Petitioner's conviction arises out of events that transpired on the evening of September 9 and early morning of September 10, 1996. The Supreme Court of Missouri provided the following recitation of the facts:

In September 1996, [petitioner] lived in a St. Louis County home one block from a second floor apartment where his ex-girlfriend and mother of his children, Carmelita Donald, lived. Living with Carmelita and her children were Carmelita's sister, Melody Donald, and friend Arthea Sanders. In the apartment below them lived their friend, Shawnee Murphy, and her three children.

[Petitioner] began dating Carmelita in 1989 and continued to have an on-and-off relationship with her through the spring of 1996. During that time, they had two children over whom they shared physical custody. In the late summer of 1996, Carmelita began dating Tony Reynolds. They succeeded in keeping that relationship a secret from [petitioner] for about a month. On the night of September 9, 1996, Carmelita went out for the evening with Reynolds. Meanwhile, [petitioner] began making a series of calls to Carmelita's apartment asking Melody about her sister's

whereabouts and instructing her to have Carmelita call him when she returned home. Melody told [petitioner] that she did not know where Carmelita was.

Shortly thereafter, [petitioner] went to the apartment and began inquiring further about Carmelita. Melody again replied that she did not know where Carmelita could be found. He made a phone call and left the apartment for approximately ten minutes. He returned with Arthea, who had been drinking. Once inside, he tried once more to find out where Carmelita had gone. One last time, Melody informed [petitioner] that she did not know. At some point, Arthea, who knew Carmelita was out with Tony Reynolds, took Melody aside and told her where Carmelita was and to lie to [petitioner] by telling him that Carmelita was at Arthea's mother's house. Apparently, the pair believed this would satisfy the already agitated [petitioner] and get him to return home. Eventually, Melody went downstairs to Shawnee's apartment to call Arthea's parents to tell them of the story they had concocted. In Shawnee's apartment, Melody found Shawnee, her three children, and a guest, James Johnson. While there, Melody heard a crashing sound coming from her apartment upstairs. When she returned to the upstairs apartment, Melody found the entertainment center "knocked over" and broken. [Petitioner] then asked Melody how she could do this to him. She denied knowing what he was talking about. Melody returned to Shawnee's apartment and reported that [petitioner] was upstairs turning over furniture because he was angry about Carmelita being absent. The two women decided to go back upstairs. [Petitioner] began pacing the apartment. He became increasingly agitated and angry, at one point making threats toward Carmelita.

Around midnight, Carmelita returned to the apartment with Tony Reynolds. They saw [petitioner's] white Cadillac parked in front. To avoid trouble with [petitioner], they drove to Reynolds' female cousin's house. There they persuaded her to drive Carmelita home. When the two women arrived back at Carmelita's apartment, [petitioner's] car was still there. As Carmelita started to climb the stairs to her apartment, [petitioner] came down, said he needed a word, and pushed her down the stairs. They walked outside, and [petitioner] asked Carmelita about her relationship with Tony Reynolds. Meanwhile, Arthea walked outside and slashed the tires on [petitioner's] car. Upon her return to the downstairs apartment, Arthea told Melody to call the police and yelled outside, asking Carmelita if she was

alright. Carmelita said she was fine. Despite Arthea's request, Melody did not call the police.

A car door "slammed" shut. Melody assumed it was [petitioner] leaving. However, [petitioner] had run into the downstairs apartment, Carmelita in pursuit. From outside, she warned Arthea to run because [petitioner] was armed and coming to get her. [Petitioner] entered Shawnee's downstairs apartment and began chastising Arthea. He then shot her in the head. Then he walked outside and pointed the gun at Carmelita. Carmelita pleaded with him to no avail; he shot her several times. Although permanently blinded, Carmelita survived.

Meanwhile, Melody and James ran into Shawnee's kitchen, hoping to escape through the back door. The door was jammed and would not open. Shawnee, while attempting to collect her children, began pleading with [petitioner]. [Petitioner] shot her in the head. Next, [petitioner] turned and pointed the gun at Melody. She fell to the floor. [Petitioner] pointed the gun at James and said, "[Y]ou next." James grabbed the gun, and he began wrestling with [petitioner]. During this time, James heard the gun "click." [Petitioner] broke free and struck James with the gun. [Petitioner] fled, and James attempted to follow. Melody escaped while James struggled with [petitioner] and ran to a neighbor's house to call the police. An officer with the University City Police Department arrested [petitioner] at his home. Both Arthea Sanders and Shawnee Murphy died as a result of their wounds.

Missouri v. Winfield, 5 S.W.3d 505, 508-09 (Mo. 1999) (Winfield I).

On September 18, 1998, petitioner was sentenced to death in accordance with the recommendation of the jury.<sup>1</sup> On direct appeal, the Missouri Supreme Court affirmed petitioner's convictions and sentences. His motion for rehearing before the Missouri Supreme Court and petition for certiorari filed with the United States

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<sup>1</sup>The death sentence was imposed for the murder convictions. A life sentence was imposed for one of the assault counts, 15 years for the other assault count, and 75 years on the armed criminal action counts, all sentences to run consecutively.

Supreme Court were denied. Petitioner's post-conviction motion pursuant to Rule 29.15 was also denied after an evidentiary hearing. The Missouri Supreme Court subsequently affirmed the denial of petitioner's Rule 29.15 motion and denied petitioner's motion for rehearing. Now before this Court is Winfield's petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, presenting fourteen grounds for relief. In response to the instant petition, respondent argues that four of petitioner's grounds for relief are procedurally barred. Respondent addresses the remaining grounds for relief on the merits.

### Analysis

#### **A. Ground One: Counsel's Concession of Guilt**

At trial, petitioner was represented by attorneys Brad Kessler and Scott Rosenblum. Attorney Kessler had primary responsibility for the guilt phase of the trial while attorney Rosenblum assumed responsibility for the penalty phase of the trial. During his opening remarks, attorney Kessler made the following statements:

He [petitioner] takes the gun that is in his car, he walks back into the apartment, and he is hot. He is mad. And he wants to know why Thea [Arthea Sanders] has slashed his tires. ... So he goes in and he snaps at that point and he shoots Thea point-blank.

...

[A]nd when the police ask him about it he admits to shooting Thea, and he admits to shooting Shawnee, but he never tells them that he has shot Carmel.

Trial Tr., Resp. Exh. A-2, p. 583-86.

During direct examination, attorney Kessler engaged in the following exchange with petitioner:

Q. What were you going to do with the gun?

A. I didn't have any intention on doing anything.

Q. Well, you did something with it. What were you thinking about when you got the gun?

A. (Pause.) I just -- I went into the apartment building and I just asked -- I just asked Arthea what the hell was going on, that's all. And from that point all hell broke loose.

Q. John, you shot her in the face, okay. That's what happened. Why did you shoot her in the face?

A. I don't know. I don't know. I didn't intend -- I didn't plan on hurting nobody.

Q. But you shot her. You shot her point-blank range in the face.

A. I just -- I said I didn't plan on -- I didn't intend on hurting nobody and nothing was planned. And I know that's no justification for anything.

...

A. No, I never had any intention to shoot anybody.

Q. But you shot them. You didn't accidentally shoot them. Your finger moved, it pulled the trigger six times.

Trial Tr., Resp. Exh. A-3, p. 894-98.

Finally, during closing arguments, attorney Kessler made the following statements:

The job before you is not to determine as much what happened, because we know what happened. Somebody shot these three people and they died, okay. That has never

been in dispute. The person who shot the people is right here. That is not disputed. That's not disputed. The question is the why it happened, because that is what the State must prove. They must prove it happened as a result of cool reflection.

...

The fact of the matter is, I don't condone what he did, its not justified, it doesn't make me happy to stand up here and have to even be in this position, all right, but the fact of the matter is there probably could not be a more explainable case of the lack of cool reflection.

...

Carmelita was shot four times, all right. Carmelita was the object of the anger. Carmelita, had she died, would have been the example that the State would have used for cool reflection. He was mad at her, all right. He had a dispute with her, he was led on by her, he was twisted by her, and he shot her four times.

Trial Tr., Resp. Exh. A-3, p. 1003-18.

Petitioner argues that these concessions of guilt were made without his express consent thereby constructively denying him his right to counsel. However, it is well-established that before a federal court can entertain a claim in a habeas petition, that same claim has to have been raised in the prior state court proceedings. Picard v. Connor, 404 U.S. 270, 275-76 (1971); Odem v. Hopkins, 192 F.3d 772, 774 (8th Cir. 1999). Indeed, "[t]he [exhaustion] rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." Picard, 40 U.S. at 276. Rather, the rule "is satisfied if the prisoner gave the state courts a 'fair opportunity' to apply controlling legal principles to the facts that are relevant to his constitutional

claim.” Odem, 192 F.3d at 774-75. “Thus, in addition to the recitation of all the facts necessary for the state court’s evaluation of the federal claim, the petitioner has to ‘fairly present’ the ‘substance’ of his federal claim.” Id. at 775.

Here, petitioner points to his Rule 29.15 motion and his 29.15 appeal for the proposition that he previously presented the instant claim to the state courts. However, petitioner’s current legal theory is distinct from any theory presented to the state courts and is procedurally barred. See Kenley v. Armontrout, 937 F.2d 1298, 1302 (8th Cir. 1991) (noting that “[t]he same factual arguments and legal theories should be present in both the state and federal claims”) (citation omitted). In claim 8(G) of his 29.15 motion, petitioner argued that he was denied effective assistance of counsel when counsel failed to “intensely prepare” petitioner for direct examination and proceeded to elicit damaging evidence on direct examination of petitioner. Resp. Exh. H-1, pp. 35-36, 100-09. On appeal of his 29.15 motion, petitioner broadened his claim and argued that attorney Kessler had constructively acted as the state’s advocate during direct examination of petitioner and during closing arguments.<sup>2</sup> Resp. Exh. Z, pp. 27, 57-65. While petitioner did cite to some of the same portions of his direct examination and attorney Kessler’s closing in both the instant petition and his state court

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<sup>2</sup>The Court notes that this claim is substantially similar to the claim raised in Ground Two of the instant petition.

filings, he did not present "the substantial equivalent" to his instant claim that counsel improperly conceded his guilt without his express consent. Picard, 40 U.S. at 278. In none of his state court filings does petitioner suggest that trial counsel acted without his consent. As such, it cannot be said that petitioner fairly apprised the state courts of the "substance" of his claim or that he allowed "the state courts a 'fair opportunity' to apply controlling legal principles to the facts that are relevant to his constitutional claim." Odem, 192 F.3d at 774-75. Therefore, Ground One is procedurally barred.

Nevertheless, "[a]n application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. §2254(b)(2). In Ground One, petitioner alleges attorney Kessler made incriminating statements during his opening statement, direct examination of petitioner, and closing argument without the express consent of petitioner. It is clear from the record that the strategy employed by counsel was not to contest whether petitioner had committed the *actus reus* of first-degree murder but to contest whether petitioner had the requisite *mens rea*. That is, trial counsel did not contest, and indeed conceded, that petitioner had shot Arthea Sanders and Shawnee Murphy. However, trial counsel consistently and repeatedly contested whether



petitioner had acted with "cool reflection."<sup>3</sup> See e.g., Trial Tr., Resp. Exh. A-3, p. 1002-18.

It is also clear from the record that petitioner provided his affirmative, explicit acceptance to this trial strategy. On the record, prior to trial and outside the presence of the jury, trial counsel engaged in a lengthy exchange with petitioner regarding the trial strategy. Id., Resp. Exh. A-2, p. 553-65. During this exchange counsel made clear that any alibi defense or reliance on mental disease or defect was being withdrawn and that the defense would present a truthful explanation to the jury about what had happened. Petitioner consented to this strategy. Id. at 561-62. Petitioner also recognized that this strategy might not result in success at the guilt stage of the proceedings but would be beneficial for the penalty stage of the proceedings. Id. at 563-64. Thus, it is clear that statements made by counsel during opening statements, direct examination of petitioner, and closing arguments were made with petitioner's consent. Ground One is without merit.

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<sup>3</sup>Mo. Rev. Stat. 565.020.1 states that "[a] person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." Deliberation is defined as "cool reflection for any length of time no matter how brief." Mo.Rev.Stat. 565.002(3).

**B.    *Ground Two:    Counsel's Constructive Absence and Ineffective Assistance of Counsel***

Citing the above-quoted portions of attorney Kessler's direct examination,<sup>4</sup> petitioner alleges in Ground Two that counsel was constructively absent from the trial and rendered ineffective assistance of counsel. Petitioner contends that during his direct examination trial counsel performed as an advocate for the state. Petitioner argues that counsel further advocated for the state by making the following statements during closing arguments:

I don't know why he doesn't remember. I don't know if maybe he does remember.

...

And you know what John's state of mind was that night. Not through his testimony because that was awful. You know, he couldn't admit he was ever mad, he was just trying to figure out what was going on.

...

We wanted a chance for you to hear everything. Should we have put on John Winfield? Did he carry the day? No. But you know what, he didn't have to, because everyone told you what John Winfield couldn't admit to himself - that he was mad, he was upset, he was pissed off, he was enraged, and he was not acting coolly.

Trial Tr., Resp. Exh. A-3, pp. 1007, 1014, 1018. As a result, petitioner contends that counsel rendered ineffective assistance of counsel.

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<sup>4</sup>See Trial Tr., Resp. Exh. A-3, p. 882-904.

As a threshold matter, petitioner argues the Missouri Supreme Court erred in applying the Strickland framework to the instant claim of ineffective assistance of counsel. Rather, petitioner contends that Ground Two should be analyzed under the framework established in United States v. Cronic, 466 U.S. 648 (1984). In Cronic, the Supreme Court identified three situations implicating the right to counsel that involved circumstances “so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” 466 U.S. at 658. First, “is the complete denial of counsel.” Id. at 659. The second category involves cases where “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” Id. Finally, the Supreme Court considered cases such as Powell v. Alabama, 287 U.S. 45 (1932), where the circumstances of trial made it “unlikely that any lawyer could provide effective assistance.” Cronic, 466 U.S. at 661. Here, there is no suggestion that the circumstances of petitioner’s trial were so inherently unfair that the final Cronic category would apply. Thus, for Cronic to apply to the instant claim, petitioner’s case must fall in one of the first two categories.

However, neither of the first two Cronic categories applies to petitioner’s claim as asserted in Ground Two. The first Cronic category includes those cases where the defendant was denied the presence of counsel at a “critical stage of his trial.” Id. at 659

(citing Hamilton v. Alabama, 368 U.S. 52 (1961) (counsel denied at arraignment) and White v. Maryland, 373 U.S. 59 (1963) (per curiam) (counsel denied at preliminary hearing)). Petitioner argues that while his counsel were physically present at trial that they were constructively absent during his direct examination and during closing arguments. While the Supreme Court has noted cases where counsel's constructive absence is sufficient to fall within the first Cronic category, "each [of these cases] involved criminal defendants who had actually or constructively been denied counsel *by government action*." Bell v. Cone, 535 U.S. 685, 696, n. 3 (2002) (emphasis added) (citing Geders v. United States, 425 U.S. 80, 91 (1976) (order preventing defendant from consulting his counsel "about anything" during a 17-hour overnight recess impinged upon his Sixth Amendment right to the assistance of counsel); Herring v. New York, 422 U.S. 853, 865 (1975) (trial judge's order denying counsel the opportunity to make a summation at close of bench trial denied defendant assistance of counsel); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (law requiring defendant to testify first at trial or not at all deprived accused of "the 'guiding hand of counsel' in the timing of this critical element of his defense," i.e., when and whether to take the stand); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (statute retaining common-law incompetency rule for criminal defendants, which denied the accused the right to have his counsel question him to elicit his statements before the jury, was

inconsistent with Fourteenth Amendment); Williams v. Kaiser, 323 U.S. 471 (1945) (allegation that petitioner requested counsel but did not receive one at the time he was convicted and sentenced stated case for denial of due process)). Here, petitioner does not allege any government action prevented his counsel from assisting him during a critical stage of the proceeding. Rather, petitioner's argument is that counsel's direct examination and closing argument were, "[i]n no sense . . . a challenge to the state's case." Pet. [Doc. #33], p. 17.

This type of argument is more akin to the second Cronic category which encompasses cases where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. at 659. However, in order for a court to presume prejudice under the second Cronic category the "attorney's failure to test the prosecutor's case . . . must be complete." Bell, 535 U.S. at 697. It is insufficient for a petitioner to argue "that his counsel failed [to oppose the prosecution] at specific points." Id. Rather, for the second Cronic category to apply, counsel must fail to oppose the prosecution throughout the "proceeding as a whole." Id. In Ground Two, petitioner does not contend that his trial counsel failed to oppose the prosecution throughout the entire trial, but instead alleges that counsel's direct examination of petitioner and closing argument were ineffective. This argument is "plainly of the same ilk as other specific attorney errors [the Supreme Court has] held

subject to Strickland's performance and prejudice components." Id. at 697-98. Thus, the Missouri Supreme Court's decision to apply Strickland to petitioner's instant claim of ineffective assistance of counsel was not contrary to or an unreasonable application of clearly established federal law.

Neither was the Missouri Supreme Court's denial of the instant claim contrary to or an unreasonable application of Strickland. To prevail on this claim of ineffective assistance of counsel, petitioner must show that his counsel's performance was deficient as a matter of constitutional law and that petitioner was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner fails to make either showing. As discussed above, the defense withdrew any alibi defense or reliance on mental disease or defect. However, the defense consistently pursued a theory that petitioner had acted without deliberation. Consistent with this theory, trial counsel called petitioner to the stand in order to demonstrate that petitioner was acting under "some extreme stress" and that "all of the sudden he just lost it." Post-Conviction Hearing Tr., Resp. Exh. G, p. 162. Prior to petitioner taking the stand, trial counsel met with petitioner numerous times and instructed petitioner that during his testimony, "[y]ou have to be emotional." Id. at p. 163. To this end, trial counsel "attempted to insert an emotional prompt with [petitioner] throughout the course of the direct examination." Id.

at p. 161-62. Thus, "the highly confrontational, and indeed cross-examination, nature of the direct-examination was a matter of trial strategy implemented for the benefit of Winfield, not advocacy for the state." Winfield v. Missouri, 93 S.W.3d 732, 737 (Mo. 2002) (Winfield II). As such, it cannot be said that trial counsel's performance fell "outside the wide range of professionally competent assistance." Strickland at 690.

Furthermore, even assuming trial counsel's performance was constitutionally deficient, petitioner has failed to demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." Strickland, 466 U.S. at 694. At trial, overwhelming and indisputable evidence was presented which demonstrated that petitioner had shot and killed two persons and had shot and wounded another. Three eyewitnesses, Carmelita Donald, Melody Donald, and James Johnson, offered testimony that petitioner had shot and killed Arthea Sanders and Shawnee Murphy. Trial Tr., Resp. Exh. A-2, pp. 603-05, 661-62, 693-95. After his arrest, petitioner informed the police that he had thrown the murder weapon into a creek. Id. at p. 768. While no firearm was recovered from the creek, the State's firearms expert testified that all of the bullets recovered from the scene had been fired from the same .380 weapon. Id., Resp. Exh. A-3, p. 824-29. Seven rounds of .380 ammunition were found in petitioner's bedroom. Id., Resp. Exh. A-2, p. 780. In light of all of this evidence, petitioner has failed to

demonstrate "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

For all of these reasons, this Court is persuaded that trial counsel's performance was reasonable. In addition, even if the Court were to assume the contrary, petitioner has failed to demonstrate any prejudice resulting from counsel's performance. The Court is not persuaded that the Missouri Supreme Court's similar determination of these same issues was contrary to, or an unreasonable application of Strickland or any other federal precedent. No right to habeas relief is shown based on the alleged errors of trial counsel as urged in Ground Two, which is rejected as without merit.

**C. *Ground Three: Failure to Investigate and Present Evidence To Impeach Prosecution Witnesses***

At trial, witnesses for the prosecution included victims James Johnson, Melody Donald, and Carmelita Donald. In Ground Three, petitioner alleges that his trial counsel rendered ineffective assistance of counsel by failing to investigate and present evidence that would have both impeached these witnesses and suggested that Mr. Johnson was the shooter. Petitioner contends that the prosecution's witnesses offered inconsistent accounts about the shooting, that their descriptions of the crime scene were not accurate, and that Mr. Johnson was covered in the victims' blood. Petitioner also argues



that other witnesses could have been called to refute the testimony offered by the prosecution's witnesses.

In response, the State argues that Ground Three is procedurally defaulted as petitioner did not present the substance of the instant claim in his 29.15 appeal. Petitioner acknowledges that Ground Three is absent from his 29.15 appellate brief filed before the Missouri Supreme Court. However, petitioner contends that the substance of Ground Three was presented to the 29.15 motion court and that the argument was preserved in the supplemental pro se brief he attempted to file with the Missouri Supreme Court during his 29.15 appeal. The Missouri Supreme Court rejected this filing as petitioner was represented by counsel at the time of his 29.15 appeal.

Generally, a "claim that is presented to the state court on a motion for post-conviction relief is procedurally defaulted if it is not renewed in the appeal from the denial of post-conviction relief." Anderson v. Goose, 106 F.3d 242, 245 (8th Cir. 1997). However, petitioner cites to Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997), for the proposition that his Ground Three arguments were properly preserved for review by this Court. In Clemmons, post-conviction counsel for the appellant filed a brief in the 29.15 appeal without giving the appellant an opportunity to review the brief and without renewing all of the issues previously raised. The appellant wished to address the omitted issues in his 29.15 appeal

and filed a motion for leave to file a supplemental brief pro se. The Missouri Supreme Court denied the motion without comment. The Eighth Circuit found that because Missouri courts sometimes allow pro se briefs, and because no Missouri rule of court or reported case specified the circumstances under which Missouri appellate courts reject pro se briefs, that the appellant had fairly presented the matter to the Missouri Supreme Court for decision on the merits. Id. at 948-49, n. 3. Therefore, the merits of the claims presented in the appellant's pro se supplemental brief were "open for decision on federal habeas corpus" review even though they had not been renewed in the brief filed by appellant's counsel. Id. at 949.

This case presents similar circumstances to those presented in Clemmons. While the substance of Ground Three was presented and rejected on the merits before the 29.15 motion court, it was not renewed in the appellant brief prepared by petitioner's post-conviction counsel. Nevertheless, the substance of Ground Three was presented in petitioner's pro se supplemental brief. See Pet. Trav. Exh. 3, pp. 8, 19-26. Under the Clemmons rationale, the fact that Missouri Supreme Court rejected petitioner's filing because he was represented by counsel is insufficient to procedurally bar Ground Three before this Court.

However, some portions of Ground Three are procedurally defaulted for reason that petitioner now seeks to expand Ground Three with "significant additional facts . . . not fairly presented to the

state court[s].” Anderson, 106 F.2d at 245 (quoting Kenley v. Armontrout, 937 F.2d 1298, 1302-03 (8th Cir. 1991)). Petitioner now claims that two witnesses, LaMont Smith and Transent Conley, could have been called to contradict the descriptions provided by the prosecution’s witnesses. While petitioner and petitioner’s post-conviction counsel had access to the affidavits of Smith and Conley prior to the denial of petitioner’s 29.15 motion, none of petitioner’s state court filings -- including petitioner’s pro se supplemental brief -- made any reference to Smith and Conley. Thus, to the extent that petitioner has broadened Ground Three to include facts of which petitioner was aware but did not present to the state courts, Ground Three is procedurally defaulted. See Poe v. Caspari, 39 F.3d 204, 208 (8th Cir. 1994) (holding that “[i]n order for a claim to have been adequately presented to a state court for procedural purposes in a habeas proceeding, the *same facts* and legal theories in support of the claim must be advanced in both state and federal court”) (emphasis added).

In addition, petitioner presents a number of exhibits in support of Ground Three which were not presented to the state courts in petitioner’s post-conviction proceedings.<sup>5</sup> Respondent has filed

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<sup>5</sup>Petitioner has numbered these exhibits 1-14, 16-18.

a motion to strike petitioner's exhibits.<sup>6</sup> The Eighth Circuit has noted:

Federal courts may conduct evidentiary hearings and supplement the state record only in extraordinary circumstances because of the obligation to defer to state courts' factual determinations. 28 U.S.C. §2254(e)(1). To overcome this hurdle a petitioner must show that the claim involves a new rule of constitutional law made retroactive to his situation, or facts that could not have been discovered by due diligence, or sufficient facts to establish constitutional error by clear and convincing evidence. 28 U.S.C. §2254(e)(2).

Hall v. Luebbers, 296 F.3d 685, 700 (8th Cir. 2002). Petitioner has not presented extraordinary circumstances that would warrant the supplementation he seeks of the state record. Therefore, respondent's motion to strike will be granted.

However, even if petitioner had properly presented the exhibits to the state court and the argument concerning Smith and Conley, he would not be entitled to habeas relief on the ineffective assistance grounds asserted in Ground Three. While petitioner has couched Ground Three in terms of trial counsel's failure to investigate, petitioner has not presented any evidence that trial counsel failed to adequately investigate the facts or law of his case. In fact, nearly all of the evidence now urged by petitioner is evidence that trial counsel possessed, such as police reports and pretrial depositions. Rather, the gravamen of

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<sup>6</sup>Previously, the Court denied without prejudice the motion to strike and stated that the motion would be reconsidered with the petition for habeas relief.

petitioner's argument is a disagreement with the trial strategy. As discussed above, trial counsel employed a strategy of contesting only the element of deliberation during the guilt phase and withdrew any alibi defense or reliance upon mental deficiency. Counsel employed this strategy after the impeachment witnesses proved uncooperative and the psychiatric reports on petitioner came back negative. Trial Tr., Resp. Exh. A-2, p. 553-558. Furthermore, counsel employed this trial strategy with petitioner's express consent. Id. at p. 562. Finally, petitioner has made no showing that would undermine the presumption of reasonableness afforded to counsel's strategic choice. Strickland, 466 U.S. at 690.

For all these reasons, this Court is persuaded that both the decision not to introduce the evidence now offered by petitioner, and the investigation supporting that decision, were reasonable. Neither is the decision shown to have been prejudicial to the defense. The Court is not persuaded that the Missouri courts' similar determinations of these same issues were contrary to, or an unreasonable application of the law. No right to habeas relief is shown based on the alleged failure of trial counsel to investigate and present evidence as urged in Ground Three, which is rejected as without merit.

**D.    *Ground Four:   Conflict of Interest***

In Ground Four, petitioner alleges that his trial counsel rendered ineffective assistance of counsel because counsel operated

under an actual conflict of interest. Petitioner alleges that six weeks prior to his criminal trial he filed a malpractice suit against attorneys Kessler and Rosenblum. The malpractice suit alleged that counsel failed to make a prompt appearance in petitioner's criminal case after petitioner paid a \$22,000 retainer, that counsel failed to adequately consult with petitioner, and that counsel generally failed to prepare a meaningful defense. In addition, petitioner alleges that personal animus between Kessler and Rosenblum regarding Kessler's decision to leave their firm created a further conflict of interest that compromised counsel's ability to work together. In response, respondent contends that Ground Four is procedurally defaulted. The Court agrees.

"A federal district court is precluded from substantively considering a habeas corpus claim that a state court has disposed of on independent and adequate non-federal grounds, including state procedural grounds." Clemons v. Luebbbers, 381 F.3d 744, 750 (8th Cir. 2004). "A state prisoner procedurally defaults a claim when he violates a state procedural rule that independently and adequately bars direct review of the claim by the United States Supreme Court, unless the prisoner can show cause and prejudice for the default, or actual innocence." Id. In the case at bar, petitioner did not timely present the conflict of interest argument asserted in Ground Four to the 29.15 motion court. Petitioner

attempted to amend his 29.15 motion to include a claim similar to Ground Four. Resp. Exh. H-2, p. 217-18. However, 29.15 motion court denied as untimely petitioner's attempt to amend. Resp. Exh. H-2, p. 236. Therefore, the 29.15 motion court did not consider the merits of petitioner's conflict of interest claim but denied the claim on state procedural grounds.

Furthermore, the fact that petitioner included the conflict of interest argument in his pro se supplemental brief filed on his 29.15 appeal does not mean that the claim is adequately preserved for federal habeas review. The rationale of Clemmons v. Delo, 124 F.3d at 944, is inapplicable on this point. In Clemmons and in Ground Three, the supplemental pro se filing simply renewed an argument that was previously and properly made in the 29.15 motion. Here, petitioner's pro se supplemental appeal brief attempted to raise an argument that was not properly asserted in his 29.15 motion. "Rule 29.15(d) provides that the movant 'waives any grounds for relief known to him that is not listed in the motion.'" Rohwer v. State, 791 S.W.2d 741, 743-44 (Mo. Ct. App. 1990). Petitioner clearly knew of the conflict of interest issue at the time of his 29.15 motion. The rejection of his attempt to amend his 29.15 motion on state procedural grounds serves as a disposition on "independent and adequate non-federal grounds." Clemons v. Luebbbers, 381 F.3d at 750. Thus, as petitioner does not assert cause or actual innocence, this Court is

procedurally barred from considering the substance of petitioner's claim. Id.

**E. Ground Five: Trial Court's Hearsay Ruling**

In Ground Five, petitioner alleges that his Sixth Amendment right of confrontation was violated when the trial court sustained a hearsay objection regarding the use of a police report to cross-examine police officer Thomas Crowley. The police report, prepared by Sgt. Crowley, included a statement by James Johnson made to Officer Robert Minaeff indicating that Mr. Johnson had chased the petitioner following the murders. During the cross-examination of Sgt. Crowley, the trial court ruled the statement was hearsay and that defense counsel could not inquire of Crowley about the statement because it was made to Officer Mineaff. Trial Tr., Resp. Exh. A-2, p. 724-36. Earlier in the trial, during cross-examination, Mr. Johnson testified that he had not made such a statement to any police officer. Id. at p. 704-06. Petitioner contends that the trial court's evidentiary ruling violated his confrontation rights because he was unable to meaningfully impeach Johnson with the prior inconsistent statement.

The Confrontation Clause "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." United States v. Owens, 484 U.S. 554, 557 (1988). The Confrontation Clause is "satisfied when the hearsay declarant testifies at trial and is available for cross-examination." Bear



Stops v. United States, 339 F.3d 777, 781 (8th Cir. 2003) (citing Mann v. Thalacker, 246 F.3d 1092, 1100 (8th Cir.) cert denied, 534 U.S. 1018 (2001)). Here, the ultimate declarant was Mr. Johnson who testified at trial and was cross-examined by defense counsel. During cross-examination, petitioner was allowed a full opportunity to question Mr. Johnson about whether his trial testimony was consistent with statements he made to the police after the shooting. See Trial Tr., Resp. Exh. A-2, p. 704-06. In addition, during closing arguments, petitioner's counsel argued that "James Johnson got up and he told you some things that weren't exactly consistent with what happened." Id., Resp. Exh. A-3, p. 1005. Thus, as petitioner was allowed a full opportunity to cross-examine Johnson and was able to argue that Johnson had made inconsistent statements, there was no Confrontation Clause violation caused by the trial court's hearsay ruling.

Rather than raise a viable Confrontation Clause issue, Ground Five serves as an invitation to reexamine an evidentiary ruling made by the trial court and affirmed by the Missouri Supreme Court. See Winfield, 5 S.W.3d at 514-15. However, on habeas review, evidentiary errors are only relevant to the extent that the presentation or admission of particular proof infringed on "a specific constitutional protection or was so prejudicial as to deny due process." Hobbs v. Lockhart, 791 F.2d 125, 127 (8th Cir.1986) (quotation omitted). "A state court's evidentiary rulings can form

the basis for federal habeas relief under the due process clause only when they were so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process.” Bounds v. Delo, 151 F.3d 1116, 1119 (8th Cir. 1998) (citations omitted). The evidentiary ruling complained of in Ground Five fails to reach this level, if indeed it was in any respect erroneous. Ground Five is without merit.

**F. Ground Six: Failure to Instruct on Lesser-Included Offenses**

At trial, the jury was instructed on both first degree murder and second degree murder. Petitioner, in Ground Six, alleges that his due process rights were violated by the trial court’s refusal to instruct the jury on the additional lesser-included offense of voluntary manslaughter. However, the Eighth Circuit has previously noted that “[t]he Constitution does not entitle a capital murder defendant to instruction on every lesser included noncapital offense . . . and the trial court need only give the jury an alternative to the all or nothing choice of capital conviction or acquittal.” Hall v. Luebbbers, 296 F.3d 685, 699 (8th Cir. 2002) (citing Schad v. Arizona, 501 U.S. 624, 645-48 (1991)). The instructions given at petitioner’s trial clearly met this mandate.

Furthermore, “[w]hen a jury convicts on first degree murder after having been instructed on second degree murder, there has been no prejudice to the defendant by the refusal to submit [an

additional lesser-included offense] instruction.” Hall, 296 F.3d at 699. While petitioner recognizes this binding Eighth Circuit precedent, he invites this Court to reconsider such authority. The Court declines the invitation. Relief is denied on Ground Six.

**G. Ground Seven: Failure to Present Evidence on Petitioner’s Mental Condition**

During the penalty phase of petitioner’s trial, the defense took the position that petitioner was a “normal law-abiding young man” who “snapped” on the night of September 9, 1996. In pursuing this strategy, the defense did not present evidence that the murders were committed while petitioner “was under the influence of extreme mental or emotional disturbance.” Mo.Rev.Stat. §565.032.3(2). Petitioner argues that defense counsel failed to fully investigate evidence of petitioner’s mental and emotional state and rendered ineffective assistance of counsel by failing to present this kind of mitigation evidence. The Missouri Supreme Court, applying a Strickland framework, rejected petitioner’s argument. Winfield II, 93 S.W.3d at 740-41. This Court is not persuaded that the state court’s determination was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. §2254(d).

As stated above, in order to prevail on a claim of ineffective assistance of counsel, petitioner must establish that

counsel's performance was deficient and that he was prejudiced by that deficient performance. Strickland, 466 U.S. at 687. "Trial counsel has a duty to conduct a reasonable investigation or to make a reasonable determination that an investigation is unnecessary." Griffin v. Delo, 33 F.3d 895, 901 (8th Cir. 1991). However, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. In the case at bar, petitioner's trial counsel undertook a reasonable investigation into petitioner's mental and emotional health and reasonably concluded that the evidence would not support the position that petitioner had acted under extreme mental or emotional disturbance.

Prior to trial, petitioner underwent a court-ordered psychiatric examination by Dr. John Rabun and a defense-requested psychiatric examination by Dr. Daniel Cuneo. Both doctors concluded that petitioner was not suffering from any mental illness at the time of the murders. During the guilt phase of trial, petitioner testified that he "wasn't happy," however he also testified that he was not angry or upset. Trial Transcript, Resp. Exh. A-3, pp. 894, 922. After considering the psychological reports, petitioner's own testimony, and discussions had with petitioner's family, trial counsel concluded that they "didn't have the evidence to support" a mitigation argument based upon extreme

mental or emotional distress. Post-Conviction Hearing Tr., Resp. Exh. G, pp. 215, 228.

Petitioner now relies on the report of Dr. Michael Stacy, obtained after petitioner's conviction was final on direct appeal and at the request of petitioner's post-conviction counsel, for the proposition that petitioner did suffer from an extreme mental and emotional disturbance at the time of the murders. However, Dr. Stacy's report is insufficient to establish ineffective assistance of counsel. "Counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion.'" Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998). (quoting Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir. 1995)). In Walls, the Eighth Circuit found that "[i]t was entirely reasonable for counsel to rely on the conclusion of two trained psychiatrists that no additional testing was warranted." 151 F.3d at 835. Here, after reasonable investigation, petitioner's trial counsel "made the reasonable decision that further investigation of psychological evidence was unnecessary." Sidebottom 46 F.3d at 753. Moreover, petitioner testified at his post-conviction deposition that he would not support any efforts to present mitigation based on mental or emotional distress. See Petitioner's Deposition, Resp. Exh. J-2, p. 132-33 (stating that he did not want attorneys Rosenblum or Kessler to put on evidence that he was "somehow crazy" or "suffering from an extreme mental or emotional state").

For all of these reasons, this Court is persuaded that both the decision not to present mitigation evidence of extreme mental or emotional disturbance, and the investigation supporting that decision, were reasonable. Neither is the decision shown to have been prejudicial to the defense. The Missouri Supreme Court's similar determination is not contrary to, or an unreasonable application of, clearly established Federal law. Ground Seven is rejected as without merit.

**H. *Ground Eight: Failure to Adequately Present Petitioner as a "Family Man"***

During the penalty phase of the trial, the defense "concentrated on putting together [a] family history, [using petitioner's] teenage daughters, his parents, people in his family unit that were important to him, to talk about his importance in the family." Post-Conviction Hearing Tr., Resp. Exh. G, p. 203. In support, the defense called four witnesses: John Edmund (petitioner's father), Marsha Edmund (petitioner's step-mother), Rosalie Bell (a family friend), and David Winfield (petitioner's brother). These witnesses testified about petitioner's relationship with his family, including his relationship with his mother, his grandmother, his children, and Carmelita Donald. Trial Tr., Resp. Exh. A-3, p. 1055-77. Further, on cross-examination of Ms. Donald during the penalty phase of the trial, defense counsel

elicited testimony that Ms. Donald had no doubt that petitioner loved their children "a lot." Id. at p. 1038.

Petitioner now contends in Ground Eight that trial counsel was ineffective for failing to fully investigate and present petitioner as a "family man" who "just snapped." Rather, petitioner argues that only a "hollow shell" of that theme was presented to the jury. Petitioner lists a number of witness he believes should have been called as mitigation witnesses and alleges that trial counsel's failure to investigate or call these witnesses constitutes ineffective assistance of counsel. These witnesses include petitioner's children (Symone Winfield and Mykale Donald), certain of petitioner's friends and family (John Sutherland, Darrell Jefferson, Frank Elliott, Maurice Patton, and Katherine Patton-Bennett), and petitioner's mother and grandmother (Evelyn Winfield and Delores Dent). Petitioner believes that these witnesses would have offered testimony describing petitioner's role as "man of the house," petitioner's relationships with his family and friends, and the increased family stress prior to the shootings.

The Missouri Supreme Court in resolving similar claims raised in petitioner's 29.15 appeal concluded that counsel's decision not to call certain mitigation witnesses was based upon trial strategy. Winfield II, 93 S.W.3d at 739-40. The Missouri Supreme Court also found that the evidence the uncalled witnesses

would have presented would have been "needlessly cumulative to evidence the defense presented during the penalty phase of trial." Id. at 740. After careful review, this Court is not persuaded that the Missouri Supreme Court's determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d).

Again, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. Here, trial counsel investigated every witness that petitioner provided to them, including many of the witnesses now offered by petitioner. Post-Conviction Hearing Tr., Resp. Exh. G, p. 204. See also Winfield, 93 S.W.3d at 740. Counsel concluded as a matter of trial strategy not to call certain mitigation witnesses. Petitioner's argument to the contrary is a product of hindsight and fails to take into account the facts reasonably relied upon by counsel at the time. Counsel's determination not to call certain witnesses during the penalty phase of the trial must be viewed "as of the time they were made." Preston v. Delo, 100 F.3d 596, 604 (8th Cir. 1996) (citing Strickland, 466 U.S. at 689-90).

At the time of trial, petitioner's children (Symone Winfield and Mykale Donald) were "adamant that they didn't want to testify." Post-Conviction Hearing Tr., Resp. Exh. G, p. 213.



Furthermore, after investigation counsel determined that the children's testimony would "hurt the defense." Id. at 214. Defense counsel's determination is supported by the children's depositions taken after petitioner's conviction. While Symone Winfield testified that she loved her father, she also testified that her mother, Carmelita Donald, was blind because of "what [her] daddy did" and that she was scared to go into the courtroom. S. Winfield Dep., Resp. Exh. U, pp. 17, 21. During his deposition, Mykale Donald described a fight between petitioner and another man, in which petitioner used a baseball bat against the other man. M. Donald Dep., Resp. Exh. V., pp. 14-15. Clearly, trial counsel's determination not to call the children as mitigation witnesses was a matter of sound trial strategy.

Also a matter of trial strategy was counsel's decision not to call petitioner's mother and grandmother, Evelyn Winfield and Delores Dent. Prior to trial, Ms. Winfield and Ms. Dent gave depositions to support an alibi defense for petitioner. Attorney Rosenblum testified that he "personally begged them not to go . . . through with the depositions because [he] thought it could seriously compromise their ability to be an effective [penalty] phase witness." Post-Conviction Hearing Tr., Resp. Exh. G, p. 206. Counsel later determined that these witnesses had made statements that "may be false or that would have been false, and the jury would have known they were false." Id. at 237. As such, counsel

determined not to call Ms. Winfield or Ms. Dent as a matter of trial strategy.

Trial counsel also determined not to call John Sutherland, one of petitioner's friends, as a mitigation witness. After interviewing Mr. Sutherland, counsel "didn't think he came off as a particularly effective witness." Id. at 319. More importantly, Mr. Sutherland has a criminal record and the trial counsel was attempting to "separate [petitioner] from any criminality." Id. at 318. Thus, after undertaking a reasonable investigation, counsel determined not to call Mr. Sutherland as a matter of trial strategy.

The remaining witnesses now urged by petitioner were not interviewed by counsel prior to the penalty phase of the trial. However, as stated above, counsel did investigate all the mitigation witnesses provided to him by defendant. Moreover, counsel adequately presented to the jury mitigation evidence based upon petitioner's family background. Counsel was able to elicit testimony concerning petitioner's relationship with his children, parents, and family. Counsel was also able to get the victim, Carmelita Donald, to admit that petitioner loved their children. As such, the issue of mitigation based upon petitioner's family background was adequately presented to the jury.

In sum, the Court is persuaded that the presentation of mitigation evidence based upon petitioner's family background and

the investigation supporting that presentation were reasonable. After investigation, counsel determined what mitigation witnesses to call as a matter of trial strategy. None of the testimony or witnesses now offered by petitioner presents any issue not adequately presented to the jury. Neither does petitioner show any reasonable probability that the outcome would have been different had additional details regarding petitioner's family background been presented to the jury. Ground Eight is rejected.

***I. Ground Nine: Failure to Allow Petitioner to Testify During the Penalty Phase of the Trial***

In Ground Nine, petitioner alleges that his trial counsel rendered ineffective assistance of counsel by failing to allow him to testify during the penalty phase of the trial. Petitioner's argument was rejected by the 29.15 motion court, which "found that [petitioner] was advised of his right to testify during the penalty phase of the trial, was advised that he should not exercise that right, and did not protest when the defense rested its case." Winfield II, 93 S.W.3d at 736. The motion court also found that petitioner had not demonstrated any prejudice caused by his failure to testify. Id. See also Resp. Exh. H-2, p. 279-83. Therefore, the motion court concluded that petitioner was not entitled to relief of the claim now asserted in Ground Nine. The Supreme Court of Missouri affirmed this conclusion on appeal. Winfield II, 93 S.W.3d at 736. Petitioner now argues that the motion court's

findings of fact on this issue are clearly erroneous and that the Missouri Supreme Court's conclusions of law are contrary to clearly established federal precedent. The Court disagrees.

While the question of ineffectiveness of counsel is a mixed question of law and fact, "state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of §2254(d)." Whitehead v. Dormire, 340 F.3d 532, 537 (8th Cir. 2003) (quoting Strickland, 466 U.S. at 698). Under this standard, factual findings will only be overturned "if it is shown by clear and convincing evidence that the state court's presumptively correct factual findings do not enjoy support in the record." Whitehead, 340 F.3d at 536. In the case at bar, there is fair support for the state court's factual findings that petitioner was advised of his right to testify and chose not to exercise that right. During the post-conviction hearing, trial counsel testified that he had spent significant time talking to petitioner about his right to testify in the penalty phase of the trial and that he had advised petitioner not to exercise his right in light of petitioner's testimony during the guilt phase of the trial. Post-Conviction Hearing Tr., Resp. Exh. G, p. 207-08. After being advised not to testify during the penalty phase of trial, petitioner never indicated to counsel that he wanted to testify. Id. at 209.

The fact that petitioner offered a different version of the facts to the state court than those testified to by his counsel does not undermine the state court's factual findings. The federal court's role is simply to ascertain whether the state court's findings of fact have fair support in the record, and "credibility determinations are left for the state courts to decide." Pittman v. Black, 764 F.2d 545, 546 (8th Cir. 1985). The state court found credible trial counsel's testimony that petitioner decided not to testify during the penalty phase of his trial. Resp. Exh. H-2 at 279. This determination was based upon the witnesses' demeanor and the testimony "taken as a whole." Id. Petitioner has failed to demonstrate that the state court's factual findings lack support in the record and therefore this Court will not overturn the state court's findings of fact.

Neither has petitioner demonstrated that he suffered any prejudice by his failure to testify during the penalty phase of the trial. Petitioner argues that the result may have been different if he had been allowed to plead for mercy based upon his desire to be a part of his family's lives. However, there is no reason to believe petitioner's plea would have had any effect on the outcome. First, in addition to presenting his family-related information, petitioner would have testified in a manner contrary to the testimony he gave during the guilt phase. At his post-conviction deposition, petitioner claimed that he was not present at the time

of the shootings and that he did not commit the murders of Shawnee Murphy and Arthea Sanders. J. Winfield Dep., Resp. Exh. J-2, p. 103. Indeed, it was this type of contradictory testimony that caused trial counsel to advise petitioner not to exercise his right to testify during the penalty phase of the trial. Post-Conviction Hearing Tr., Resp. Exh. G, p. 207-08. Second, as discussed above, petitioner's family-related information was adequately presented to the jury through the mitigation witnesses called by the defense. Finally, it appears highly unlikely that the jury would have been swayed by petitioner's pleas based upon his relationship to his family, as the jury had previously convicted petitioner of shooting and blinding the mother of his children. In sum, petitioner has failed to demonstrate any prejudice due to his failure to testify during the penalty phase of the trial. Neither has petitioner demonstrated that the state court's factual findings lack support in the record. Ground Nine is without merit.

**J. Ground Ten: Striking of Venireperson Stokes**

During voir dire, the venire panel was asked whether they could consider imposing the death penalty. In response venireperson Stokes asserted that she would have difficulty in imposing the death penalty. Specifically, Ms. Stokes stated "I'm a nurse. I been [sic] a nurse for 35 years. It would be extremely difficult for me under any circumstance 'cause [sic] I spent my life taking care of people. To say that I could impose the death

penalty, I just don't think I could." Trial Tr., Resp. Exh. A-1, p. 254. Ms. Stokes later stated that she "would certainly try [to follow the court's instructions], but we all have personal opinions and we bring them with us everywhere we go, we don't just leave them outside." Id. at 259. At the conclusion of voir dire, the State moved to strike Ms. Stokes for cause and the trial court struck Ms. Stokes for cause. Id. at 272-73. The Missouri Supreme Court affirmed the trial court's determination on appeal. Winfield I, 5 S.W.3d at 510-11. In Ground Ten, petitioner alleges that the trial court erred in excusing Ms. Stokes from the jury.

A trial court may excuse a juror for cause if it "find[s] that the juror's views would 'prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" Hulsey v. Sargent, 865 F.2d 954, 956 (8th Cir. 1989) (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1998)) (emphasis in original). The "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." Witt, 469 U.S. at 429. Thus, in reviewing a state court's determination, "deference must be paid to the trial judge who sees and hears the juror." Id. at 426.

Here, the trial court determined that Ms. Stokes was "very strong" in her opinion that she could not impose the death penalty. Trial Tr., Resp. Exh. A-1, p. 272-73. The record fairly

supports the trial court's findings. When first asked, Ms. Stokes unequivocally stated that she could not impose the death penalty. Id. at 252-54. For instance, the State asked Ms. Stokes, "[s]o you do not think that you could consider giving the death penalty?" Id. at 254. Ms. Stokes responded: "[t]hat's correct." Id. Although petitioner points to other testimony suggesting that Ms. Stokes would attempt to follow the rule of law, the trial court was left with the definite impression that Ms. Stokes would be unable to faithfully and impartially apply the law. Giving the appropriate deference to the trial court's conclusion, this Court is not persuaded that the trial court erred in excusing Ms. Stokes for cause. The Missouri Supreme Court's similar determination is not contrary to, or an unreasonable application of federal law. Ground Ten is rejected as without merit.

**K. *Ground Eleven: Charging Instrument Violated Apprendi and Ring***

In Ground Eleven, petitioner claims that the amended information used in his criminal case violates the United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002), because it did not include the aggravating factors necessary for imposition of the death penalty. In Apprendi, the Supreme Court interpreted the constitutional due-process and jury-trial guarantees to require that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory



maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In Ring, the Supreme Court applied this principle to the death sentence imposed under the Arizona sentencing scheme. 536 U.S. at 584. The Supreme Court recently clarified however that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." Schriro v. Summerlin, 542 U.S. ---, ---, 124 S.Ct. 2519, 2526 (2004). Therefore, as petitioner's case was already final on direct review prior to Apprendi and Ring, Ground Eleven is without merit.

**L. *Ground Twelve: Failure to Instruct the Jury on Non-Statutory Mitigating Factors***

During the penalty phase of the trial, the defense proffered a mitigation instruction which called for the jury to consider the following non-statutory circumstances:

John is a dedicated, caring and loving son to Evelyn Winfield.

John is a dedicated, caring and loving grandson to Dolores Dent.

John is a dedicated, caring and loving son to John Edmonds.

John is a loving dedicated, caring and very good father to his son and daughter Mykarl [sic] and Simone and actively participated in their upbringing of the children.

John is a good and dedicated step-son to Maria Edmonds.

John is a loving and dedicated brother to David Winfrey.

Resp. Exh. B-1, p. 188.

The trial court refused the instruction. However, the trial court instructed the jury, using a Missouri Approved Instruction, to "consider any other facts or circumstances which you find from the evidence in mitigation of punishment." Id. at p. 167, 179.<sup>7</sup> The Missouri Supreme Court affirmed the trial court on direct appeal. Winfield I, 5 S.W.3d at 513. Petitioner now argues that the Missouri Supreme Court's determination was contrary to clearly established federal law, because the mitigation instruction given to the jury did not allow the jury to give effect to the mitigation evidence.

"Clearly established federal law holds that states may not 'preclude the sentencer from considering any mitigating factor.'" Richardson v. Bowersox, 188 F.3d 973, 981 (8th Cir. 1999) (quoting Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982)). "[I]t is not enough simply to allowed the defendant to present mitigating evidence to the sentencer." Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (Penry I). "The sentencer must also be able to consider and give effect to [mitigation] evidence in imposing [the] sentence." Id. In the case at bar, petitioner was able to present mitigation evidence to the jury. Moreover, the mitigation instruction given to the jury adequately allowed the jury to give effect to petitioner's mitigation evidence.

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<sup>7</sup>The instruction given was a based on M.A.I.-CR 3d 313.44a.

As stated above, an approved instruction was given to the jury instructing them to "consider any other facts or circumstances which you find from the evidence in mitigation of punishment." Resp. Exh. B-1, p. 167, 179. The Eighth Circuit has previously held that the "approved instruction which informed the jury that it 'may also consider any circumstances which you find from the evidence in mitigation of punishment' adequately covered the jury's consideration of mitigating evidence and complied with constitutional requirements for the submission of mitigating circumstances in death penalty cases." Tokar v. Bowersox, 198 F.3d 1039, 1050 (8th Cir. 1999), cert. denied 531 U.S. 886 (2000). The nearly identical instructions given at petitioner's trial equally complied with the constitutional requirements for the submission of mitigating circumstances.

The Supreme Court's ruling in Penry v. Johnson, 532 U.S. 782 (2001) (Penry II), does not alter this conclusion. In Penry II, the defendant was convicted of rape and murder. 532 U.S. at 786. In assessing punishment, the jury was instructed to answer three "Special Issues." Id. at 789. Specifically, the jury was instructed to answer whether the defendant acted deliberately, whether there was a probability that the defendant would be dangerous in the future, and whether the defendant acted unreasonably in response to provocation. Id. The jury was further instructed that if they reached an affirmative finding for each of

the "Special Issues" that the defendant must be sentenced to death. Id. After answering "Yes" to each of the "Special Issues," the jury recommended that the defendant be sentenced to death. The Supreme Court held that the "Special Issues" instructions failed to comply with the holding of Penry I, because they failed to provide the jury with a "vehicle for expressing its 'reasoned moral response'" to the mitigation evidence. Penry II, 532 U.S. at 797 (quoting Penry I, 492 U.S. at 328). However, the Supreme Court also recognized that a "clearly drafted catchall instruction on mitigating evidence" may have complied with the requirements set forth in Penry I. Penry II, 532 U.S. at 803.

At petitioner's trial, the jury was given a clearly drafted catchall instruction of mitigating evidence, which adequately instructed the jury that they may consider and give effect to any mitigating evidence. In addition, unlike the instructions in Penry II, the jury was not instructed that they were required to recommend a death sentence absent specific mitigating factors. The instructions therefore complied with the Supreme Court's mandate in Penry I and Penry II. As such, the Missouri Supreme Court's conclusion was not an unreasonable application of clearly established federal law. Ground Twelve is rejected as without merit.

**M.     *Ground Thirteen: Introduction of "Prior Bad Acts"***

In Ground Thirteen, petitioner contends that the admission of "prior bad act" evidence during the penalty phase of his trial violated his right to due process. During the penalty phase, the trial court permitted the state to elicit testimony from Carmelita Donald about prior acts committed by the petitioner. Specifically, Ms. Donald testified that the petitioner assaulted her in 1992, leaving her with a black eye. Trial Tr., Resp. Exh. A-3, p. 1034-35. Ms. Donald also testified that during an argument the petitioner had threatened her with a gun and coerced her into having sex with him. Id. at 1035-36. Ms. Donald testified that the gun was the same as the one the petitioner had used during the shootings of September 10, 1996. Id. at 1036.

The trial court determined that the relevance of the testimony outweighed any prejudicial effect and permitted Ms. Donald to testify. Id. at 1026-29. The Missouri Supreme Court affirmed on appeal, concluding that the trial court had discretion to admit "whatever evidence it deem[ed] helpful to the jury in assessing punishment." Winfield I, 5 S.W.3d at 515 (citation omitted). Petitioner contends that the trial court's evidentiary ruling was erroneous and that the Missouri Supreme Court's decision was contrary to clearly established federal law.

"An erroneous state-court evidentiary ruling violates the Due Process Clause only if it is 'gross, conspicuously prejudicial

or of such import that the trial was fatally infected.'" Richardson v. Bowersox, 188 F.3d 973, 980 (8th Cir. 1999) (quoting Redding v. Minnesota, 881 F.2d 575, 579 (8th Cir.1989)). "The Supreme Court has held that a wide scope of evidence and argument is admissible during the penalty phase of a capital murder trial, provided that such evidence is not 'constitutionally impermissible or totally irrelevant to the sentencing process.'" Gilmore v. Armontrout, 861 F.2d 1061, 1073 (8th Cir. 1988) (quoting Zant v. Stephens, 462 U.S. 862, 885 (1983)).

After reviewing the record, this Court cannot say that the trial court's determination was error, much less that the testimony was "so conspicuously prejudicial or of such magnitude that it fatally infected the trial and deprived [petitioner] of fundamental fairness." McDaniel v. Lockhart, 961 F.2d 1358, 1360 (8th Cir. 1992). The record reveals overwhelming evidence that petitioner committed the murders of Arthea Sanders and Shawnee Murphy, that petitioner brutally shot Ms. Donald four times, and that petitioner showed little remorse for his actions. Petitioner has failed to show how the admission of his prior bad acts infringed upon any specific constitutional right or how the admission was so prejudicial as to deny him due process. Accordingly, Ground Thirteen will be denied.

**N. Ground Fourteen: Proportionality Review**

In his fourteenth and final ground, petitioner asserts that the Missouri Supreme Court's review of the proportionality of his sentence violated his right to due process and his right to be free from cruel and unusual punishment. Missouri law requires such a review of all capital punishment cases. Mo.Rev.Stat. §565.035. "While proportionality review is not mandated by the Constitution, once in place it must be conducted consistently with the Due Process Clause." Tokar v. Bowersox, 198 F.3d 1039, 1052 (8th Cir. 1999). "Proportionality review satisfies due process when a state court compares the defendant's case with other similar cases." Hall v. Luebbers, 296 F.3d at 699. Here, after comparing petitioner's case to similar cases, the Missouri Supreme Court concluded that "capital punishment is not excessive or disproportionate in the case at bar." Winfield I, 5 S.W.3d at 517. "The Constitution does not require [federal courts] to look behind [the Missouri Supreme Court's] conclusion to consider the manner in which the Missouri Supreme Court conducted its review or whether the court misinterpreted the Missouri statute." Tokar, 198 F.3d at 1052. As the Missouri Supreme Court compared petitioner's case with other similar cases, this Court will look no further. Hall, 296 F.3d at 699. Ground Fourteen is rejected.

Conclusion

Upon careful consideration, the Court determines that petitioner has not shown an entitlement to habeas corpus relief on any of the grounds asserted in his petition. The Court has also reconsidered respondent's motion to strike petitioner's exhibits and the motion to strike will be granted. Finally, petitioner has failed to demonstrate that an evidentiary hearing is warranted under the applicable standards enunciated in 28 U.S.C. §2254(e) (2). The request for an evidentiary hearing will therefore be denied.

Accordingly,

**IT IS HEREBY ORDERED** that respondent's motion to strike petitioner's exhibits [Doc. #39] is granted and petitioner's exhibits numbered 1 through 14, 16 through 18, and 24 through 28 are deemed stricken.

Dated this 30th day of March, 2005.

/s/ Donald J. Stohr  
UNITED STATES DISTRICT JUDGE